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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	CC Docket No. 96-149
and	)	DOCKET FILE COPY ORIGINAL
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

To: The Commission

REPLY COMMENTS OF BELLSOUTH CORPORATION

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SUMMARY

The Statute Speaks for Itself. The Commission should follow the statute. Congress considered in great detail which safeguards should apply to particular BOC activities. Its decisions are reflected in the statute. Congress considered the additional safeguards commenters have urged the Commission to adopt, but it left them out of the statute. Section 272 is complete, it speaks for itself. The Commission is not free to supplement its provisions by rule. Accordingly, the Commission cannot engraft onto Section 272 safeguards taken from *Computer II* or other parts of the statute.

Joint Marketing. Congress sought to promote parity among the BOCs and the major IXCs in their ability to offer consumers "one-stop shopping" for local and long-distance service. Restrictions beyond those set forth in Section 272 on the joint marketing and sales efforts of the BOCs alone will destroy this parity, impair competition, deprive consumers of meaningful choices, and entrench AT&T and the predominant IXC.

A recent study demonstrates that most consumers want to purchase local and long-distance service as a bundle from a single company, have a single point of contact, and get a single bill. Moreover, most of those consumers wanting bundled service are likely to buy it in the first few years it is available. Accordingly, restricting the BOCs' ability to compete for these customers in the early years will limit consumers' choices when it matters most.

The study shows that the big three IXCs are better known to consumers than the BOCs. This gives AT&T and the other major IXCs the advantage in marketing bundled services. In the study, a majority of consumers interested in bundled service named AT&T as their preferred supplier. Thus, even without restraining BOC joint marketing, the incumbent IXCs have advantages in capturing residential bundled service market share.

AT&T and the established IXCs also have substantial advantages in marketing bundled services to the business market. Business usage is highly concentrated, and IXCs already have direct access to the highest-usage businesses without using LEC facilities. IXCs can already offer integrated local and long-distance service to the vast majority of high-usage business customers. If the FCC's rules prevent the BOCs from jointly marketing local and long-distance service to businesses, the major IXCs will secure these accounts, thereby securing the high market share of the incumbent IXCs. Moreover, if the BOCs' joint marketing efforts are restrained, there will be less price competition.

Consumers want one-stop shopping for bundled local and long-distance service. Congress sought to give consumers that choice. By arguing for restrictions on the BOCs' ability to offer one-stop shopping, AT&T now seeks to deny consumers that choice.

In particular, AT&T's proposal to prohibit nearly all inbound joint marketing by BOCs and to prohibit billing and customer care after the initial sale would gut the statute, which specifically allows the BOCs to "market or sell" their affiliates' interLATA service. Congress used broad and inclusive language. AT&T's narrow interpretation would vitiate what Congress enacted. If

Congress had intended to limit the BOCs to accepting orders initiated by customers, it would have said so.

AT&T also asks the Commission to restrict joint marketing by imposing new obligations on the BOCs' joint marketing, such as advance public disclosure of the terms of BOC joint marketing arrangements and additional nondiscrimination safeguards. These are not in the statute and contravene the judgment of Congress that the BOCs may engage in joint marketing without being deemed discriminatory. Congress authorized BOC joint marketing to promote parity with the major IXCs. Imposing regulatory constraints on the BOCs, while leaving the IXCs unconstrained, is directly contrary to the will of Congress. AT&T's attempts to hamstring its competition would deny consumers the ability to choose the BOC as their single point of contact for local and long-distance service, violating the letter and the spirit of the pro-competitive, pro-consumer 1996 Act.

Enforcement Procedures. BellSouth objects to AT&T's proposed enforcement procedures, which are unnecessary and unworkable. The 90-day deadline for acting on complaints does not pertain to final Commission adjudications under Section 271(d)(6)(A). Such enforcement proceedings are initiated only after the Commission has determined that a BOC has failed to continue complying with Section 271—in other words, after it has completed action on a complaint. The 90-day time limit applies only to the Commission's decision whether to dismiss a complaint or initiate an enforcement proceeding because the complainant has made out a *prima facie* case. Congress imposed no time deadlines on such enforcement proceedings, in which the Commission is obligated to give the defendant BOC meaningful notice and opportunity for hearing. Congress did not intend to give the BOC only two weeks in which to submit all the documents and evidence on which it intends to rely in preserving its authorized interLATA service. In fact, it is unlikely that all the documents and evidence could even be identified and gathered in such a time frame. BellSouth's comments include more reasonable proposed procedures for acting on complaints.

InterLATA Information Services. BellSouth disagrees with AT&T's and Sprint's view of when an information service is interLATA. Bell Atlantic has made clear that a BOC information service is interLATA only when the BOC provides its own interLATA transmission as part of the information service. Moreover, a service does not become an interLATA information service solely because interLATA links are used to support it, as, for example, by providing access to centralized databases or processors. Such interLATA transport does not involve "telecommunications," as defined in the act, and the service would, accordingly not be an interLATA information service. Any alternative interpretation would severely constrain a BOC's ability to develop efficient network architecture.

Incidental InterLATA Services. AT&T and MCI argue that BOCs should be subject to nondiscrimination obligations in providing incidental interLATA services and should be required to unbundle all the elements of their incidental interLATA services. These arguments are contrary to the statute. Congress authorized the BOCs to provide incidental interLATA services without a separate affiliate, and the nondiscrimination provisions of Section 272(c) apply only to the BOC's dealings with the affiliate, not the internal dealings of the BOC itself. Similarly, each of the Section 272(e) safeguards expressly states whether it applies to the BOC's internal operations. Moreover, AT&T's and MCI's proposals are inconsistent with the entire structure of Section 272. An incidental interLATA service, by definition, includes interLATA transport, which a BOC could not offer to others on an unbundled basis except through its separate affiliate.

TABLE OF CONTENTS

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	)	
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To: The Commission

REPLY COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation ("BellSouth"), by its attorneys, hereby replies to comments filed in response to the Commission's *Notice of Proposed Rule Making*, CC Docket No. 96-149, FCC 96-308 (released July 18, 1996) (*NPRM*), *summarized*, 61 Fed. Reg. 39,397 (July 29, 1996).[1] In particular, BellSouth addresses comments by AT&T and others that urge the Commission to adopt rules and policies that would severely undercut the ability of the Bell Operating Companies ("BOCs") to engage in joint marketing. BellSouth shows herein that restrictions on joint marketing would deprive the public of the considerable benefit of the truly competitive "one-stop shopping" opportunity that Congress intended to make possible and would ensure AT&T dominance in the marketplace for integrated telecommunications service.

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1 References herein are to the paragraph and footnote numbers in the FCC-released version of the *NPRM,* which differ from those in the version published in the Federal Register.

I. RESTRICTIONS ON BOC JOINT MARKETING WOULD DIMINISH COMPETITION, DEPRIVE CONSUMERS OF CHOICE, AND FAVOR AT&T IN OFFERING "ONE-STOP SHOPPING" (*NPRM* ¶¶ 90-93)

As BellSouth has already shown, Congress sought to promote parity among the BOCs and the major interexchange carriers ("IXCs") in their ability to offer customers "one-stop shopping" for bundles of local and long-distance service.[2] Imposing restrictions on the BOCs' joint marketing and sales efforts that are not applicable to AT&T and other major IXCs will destroy this parity. As a result, competition will suffer. Consumers will be deprived of meaningful choices by such restrictions on BOC joint marketing. AT&T principally stands to benefit from this by gaining a substantial share of integrated local and interexchange service, thereby cementing its position as the predominant provider of interexchange service.

Consumers emphatically want to buy local and long-distance service in a package from one company and get a single bill. In a recently published study entitled "Branding & Bundling Telecommunications Services: Telephony, Video & Internet Access,"[3] the consulting firm MTA-EMCI found substantial demand for bundled telecommunications services: "Over 80% of consumers would buy at least one combination of telephony, video and Internet services from a single telecommunications provider at the same cost as now."[4] Most of the respondents (57%) included both local and long-distance telephone service in the bundle they want to buy from a single vendor, with a single bill and point of contact.[5]

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[2] BellSouth Comments at 8-9.

[3] Andrew Roscoe, et al., *Branding & Bundling Telecommunications Services: Telephony, Video & Internet Access* (Malarkey-Taylor Associates, Inc./Economic and Management Consultants, Inc. ("MTA-EMCI"), August 1996) ("MTA-EMCI Study").

[4] *Id.* at 142.

[5] *Id.* at 144 (Table 7.2, Preferred Combination of Service).

Regulatory parity among the BOCs and IXCs with respect to joint marketing is critical during the start-up phase, because a high proportion of consumers are likely to buy bundled service soon after it is available. MTA-EMCI found that 32% of its respondents are likely to buy bundled local and long-distance service in the first or second year, growing to 55% over the long term.[6] Accordingly, any restrictions limiting the BOCs' ability to compete for bundled-service customers through joint marketing during this initial period will deny consumers important choices at the most critical time: when they are choosing a provider.

The big three IXCs already have a major advantage in marketing bundled services to consumers. The MTA-EMCI Study found that AT&T, MCI, and Sprint are far better known to consumers than any of the BOCs, both nationally and regionally. As Figure 1 shows, 97% of the respondents nationwide were aware of AT&T, 84% were aware of MCI, and 75% were aware of Sprint, while only 52% were aware of BellSouth.[7] Even among respondents in the South,

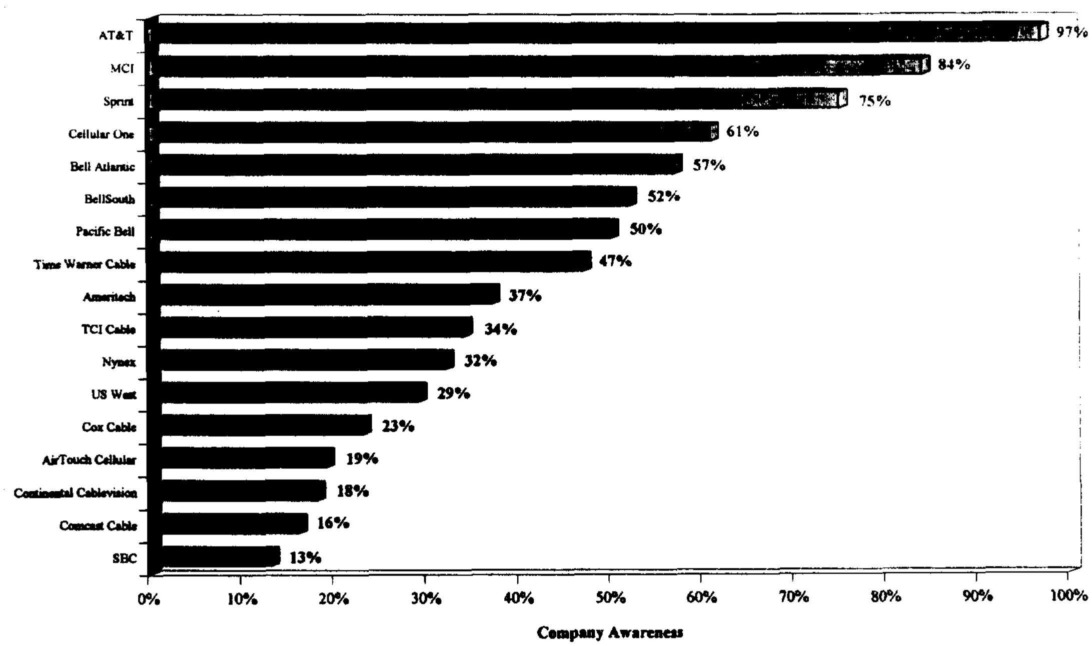

Figure 1 [Source: MTA/EMCI, by permission]

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6 *Id.* at 153-154.

7 *Id.* at 118.

BellSouth's name awareness was lower than the big three IXCs (64% for BellSouth, compared with 97% for AT&T, 82% for MCI, and 77% for Sprint).[8]

This brand awareness advantage translates directly into a marketing advantage in offering bundled local and long-distance service for AT&T, in particular, as well as the other major IXCs. The MTA-EMCI Study found that among its respondents, "AT&T was the clear favorite to provide these services."[9] A majority (50.3%) of the consumers interested in buying bundled service named AT&T as their first choice supplier, while none of the BOCs was the first choice of more than 5%. The big three IXCs were named by 61.3% of the respondents nationally, while only 19.1% named a BOC.[10] BOCs are at a disadvantage in selling bundled service even in their home regions; in the South, for example, the big three IXCs were chosen as the preferred supplier of bundled service by 61.1%, while BellSouth was chosen by only 8.4%.[11] Accordingly, even if the Commission does not tilt the playing field by restricting the BOCs' ability to engage in joint

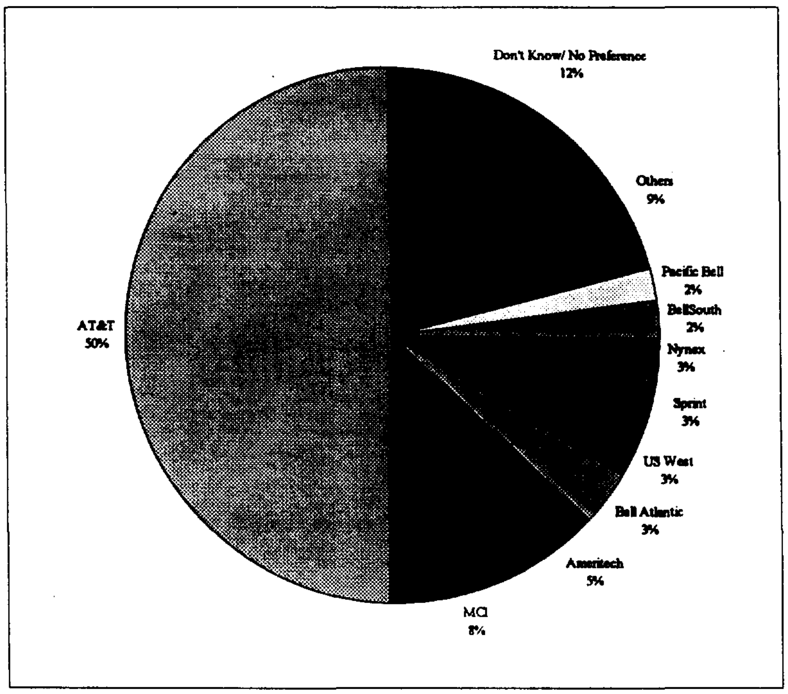

Figure 2 [Source: MTA/EMCI, by permission]

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8 *Id.*

9 *Id.* at 155.

10 *Id.*

11 *Id.*

marketing, AT&T and the other major IXCs will still have an advantage in capturing market share for residential bundled services.

In the business market, AT&T and the established IXCs are even more likely to attract a large market share with their bundled service offerings. IXCs are already capable of bypassing the local exchange carrier ("LEC") for access to the highest-usage business subscribers.[12] Ameritech notes that business revenue is highly concentrated, with 20% of business customers accounting for about 80% of business revenues.[13] Business usage is also highly concentrated geographically. Just 15% of the wire centers in BellSouth's region account for 75% of all retail business revenues. IXCs either directly, or through existing business relationships with CAPs, are currently positioned to offer integrated facilities-based local and long-distance service to the vast majority of high-usage business customers. MCI has "already built local networks reaching 45% of [its] business customers."[14] MFS recently announced that it expects within three years to have facilities available in 85 cities, reaching 70% of all U.S. businesses.[15] After its merger with WorldCom, the fourth-largest IXC, it will be able to offer integrated local, long-distance, internet, and international services to businesses over these facilities.[16]

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12 Ameritech notes that competitive access providers ("CAPs") have deployed 761,000 fiber miles, concentrated "where population density is greatest and usage is heaviest." Ameritech Comments at 15-16. In BellSouth's region, CAPs are currently collocated in 19 of the top 20 wire centers.

13 Ameritech Comments at 15.

14 Gerald Taylor, President, MCI Telecommunications Corp. (*quoted in* John J. Keller and Gautam Naik, *Merger Poses a Bold Challenge to Bells,* Wall St. J., Aug. 27, 1996, at A3.

15 Conference call with Bernard J. Ebbers, Chairman, WorldCom, Inc. and James Q. Crowe, Chairman, MFS Communications, Inc., and securities analysts (Aug. 26, 1996).

16 *See* Steven Lipin and Leslie Cauley, *WorldCom Reaches Pact to Buy MFS in $14.4 Billion Stock Deal,* Wall St. J., Aug. 26, 1996, at A3-4 ("'We will provide end-to-end service with one provider,' said Bernard J. Ebbers . . . . [A] WorldCom-MFS combination would be able to . . . [o]ffer true one-stop shopping for their corporate accounts. Under the WorldCom-MFS approach, customers would be able to buy local, long-distance, data and Internet services from a single

If the BOCs are unable to compete effectively for the largest business bundled-service accounts due to joint marketing restrictions, the major IXCs are likely to secure these accounts soon after introducing bundled local and interLATA service. Thus, restrictions on BOC joint marketing will inevitably lead to an even higher market share for AT&T and its IXC cohorts, ensuring that they will continue to dominate the domestic interexchange marketplace even as residential and business consumers switch to bundled service packages.

The MTA-EMCI Study is premised on prices for bundled services remaining the same as for unbundled service. If the BOCs are restrained in their ability to engage in joint marketing, that premise may hold true, given the big three IXCs' record of lock-step pricing.[17] Joint marketing by the BOCs, however, is likely to lead to more vigorous competition for bundled services, including price competition. If AT&T must compete for "one-stop shopping" customers not only with MCI and Sprint, but also with the in-region BOC, consumers will benefit as the competing companies lower the prices for their bundled service offerings to develop market share. In an environment of vigorous price competition, AT&T would not be able to garner a 50% market share without lowering its prices.

Consumers clearly want to be able to buy bundled local and long-distance service, with a single bill and a single point of contact for customer care. By permitting the BOCs to engage in joint marketing once they have satisfied the competitive checklist, Congress sought to give consumers that choice. AT&T seeks to deny consumers that choice. AT&T asks the Commission to forbid the BOCs from providing consumers with a single bill for local and interLATA service, to bar a single point of contact for post-sale customer care, and to prohibit BOCs from promoting

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carrier.").

17 *See* BellSouth Phase II Comments in CC Docket No. 96-61 at 3-16 & Attachments (filed Apr. 25, 1996); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, *Notice of Proposed Rule Making*, 11 F.C.C.R. 7141, 7183-84 (1996).

their affiliates' interLATA service when customers call.[18] Of course, these restrictions would not apply to AT&T. The anticompetitive restrictions on BOC joint marketing urged by AT&T are, at their root, contrary to the interests of consumers and will benefit only AT&T by ensuring that AT&T will continue to be the predominant provider of interexchange service in the United States.

BellSouth urges the Commission to empower consumers to choose. BOCs should be able to compete for consumers wishing bundled service on the same basis as AT&T and other companies. Restrictions on BOC joint marketing would effectively eliminate in-region BOCs as a choice for customers, because both business and residential customers want to deal with a single company for their local and long-distance needs.

[18] *See* AT&T Comments at 54-58.

II. THE FCC SHOULD REJECT THE RULES PROPOSED BY AT&T FOR IMPLEMENTING THE JOINT MARKETING PROVISIONS OF SECTION 272(g) (*NPRM* ¶¶ 90-93)

In its comments, AT&T has put forth suggested interpretations of the joint marketing provisions in Sections 271(e) and 272(g)(1), (2) of the 1996 Act which greatly exceed, and even contravene, the express language of the statute. AT&T's interpretations would, if adopted, affectively gut the joint marketing provisions of the Act, rendering them ineffective. BellSouth reiterates herein that the Commission may not adopt rules prohibiting what Congress has expressly authorized.

Under *Chevron* and its progeny, courts do not defer to agency statutory interpretations where the statute is clear.[19] The joint marketing provisions of the statute *are* clear, and "[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."[20] Accordingly, BellSouth urges the Commission to reject AT&T's proposed rules for implementing the joint marketing provisions of the 1996 Act. AT&T's interpretations are contrary to the plain language of the statute and, as shown below, would frustrate the clear intention of Congress.

A. The Commission Should Reject AT&T's Baseless Proposal to Forbid BOCs from Jointly Servicing Customers' InterLATA and Local Exchange Accounts After the Customer Initially Subscribes to a Service

Under Section 271(e)(1), the major long-distance companies may "jointly market" resold local exchange service with their interLATA service only after the BOCs have been authorized to enter the interLATA business in-region, a limitation recently rendered meaningless by the

19 *See Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984).

20 *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940), *quoted in Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *see Caminetti v. United States*, 242 U.S. 470, 490 (1917).

Commission's *Interconnection Order,* which permits them to provide bundled local and long-distance service using unbundled network elements purchased from the BOC.[21] Nevertheless, BellSouth agrees with AT&T and the Commission that the terms "jointly market" in § 271(e) and "market or sell" in § 272(g) are intended to mean the same thing.[22] In fact, Section 272(g)'s heading uses the phrase "joint marketing" to describe the coverage of subsections 272(g)(1) and (g)(2), which actually use the term "market or sell."

BellSouth disagrees, however, with AT&T's proposed distinction between "marketing" and "customer care." AT&T argues that marketing is limited solely to efforts by a firm to persuade a potential customer to subscribe to its services, and that any action undertaken after a customer has signed up falls outside the scope of marketing.[23] BellSouth flatly disagrees. In the joint marketing provisions of Section 272(g) and 271(e) Congress sought to establish parity among the BOCs and the major IXCs with respect to their ability to offer one-stop shopping.[24] If AT&T's relationship with its local service resale customers is not restricted after the initial sale, then parity forbids the Commission from restricting the BOC from continuing to service its interLATA service customers after the initial sale. Congress did not intend to shackle one competitor while giving the other free rein; rather, it sought to free both the BOCs and the IXCs to compete for customers who want a single point of contact for all their telecommunications needs.

Neither the Act itself nor its legislative history supports the narrow definition of joint marketing AT&T proposes. It is noteworthy, however, that in interpreting the term "joint

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21 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket 96-98, *First Report and Order,* FCC 96-325, ¶¶ 356-65 (Aug. 8, 1996) (*"Interconnection Order"*).

22 *See NPRM* at ¶ 91 & n.166; AT&T Comments at 54.

23 *See* AT&T Comments at 54.

24 S. Rep. No. 23, 104th Cong., 1st Sess. 23, 43 (1995) ("Senate Report").

marketing" in connection with commercial mobile radio services, as used in Section 601(d) of the 1996 Act, the Commission has said it views "joint marketing" as "the advertising, promotion, and sale, at a single point of contact, of the CMRS, telephone exchange service, exchange access, intraLATA and interLATA telecommunications, and information services provided by the BOC. Such joint marketing also includes, but is not limited to, activities such as promotion, advertising and in-bound service marketing."[25] Similarly, when Congress decided that a BOC can, after satisfying stated criteria, "jointly market" or "market or sell" its affiliate's interLATA service, it did not intend to impose unstated limits on the kind of marketing activities the BOC may engage in. Instead, it broadly authorized the BOC to market or sell that service, period.

In fact, by using the phrase "market or sell" in Section 272(g), Congress indicated its intention to be inclusive. A BOC's *sale* of an interLATA service to a customer is not a one-time event that ends once a customer record has been entered into the computer. The sale of an ongoing service continues for as long as the customer continues to purchase the service. Moreover, billing for the service and providing a continuing point of contact for customer care are essential elements of the sale of telecommunications services.

The Commission has not proposed to interpret "market or sell" so narrowly as to bar BOCs from continuing to service the interLATA accounts of customers who purchase both local and interLATA service after the customer initially subscribes. If Congress had wanted to restrict the definition of joint marketing to the narrow view advanced by AT&T, it could have done so explicitly when it added new definitions to Section 3 of the Communications Act.[26] Since Congress chose not

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[25] *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, WT Docket No. 96-162 & GEN Docket No. 90-314, *Notice of Proposed Rulemaking, Order on Remand, and Waiver Order*, FCC 96-319, at ¶ 64 (released Aug. 13, 1996).

[26] *See* 47 U.S.C. § 153.

to impose such a narrow definition of "sale or market" or of "joint marketing," the Commission should decline to adopt AT&T's proposed definition.[27]

[27] *See Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, CS Docket No. 96-46, *Second Report and Order*, 3 Com. Reg. (P & F) 196, 275 (1996), *recon., Third Report and Order and Second Order on Reconsideration,* FCC 96-334 (Aug. 8, 1996).

B. AT&T's Proposed Joint Marketing Restrictions Under Section 272(g)(1) are not Supported by the Statutory Language or the Legislative History of the 1996 Act and Should Be Disregarded

As BellSouth demonstrated in its initial comments, Section 272(g)(1) permits a BOC affiliate to jointly market and sell the BOC's telephone exchange services with the affiliate's interLATA services, provided that the BOC permits other entities offering "the same or similar service" to market and sell its telephone exchange services. The Conference Report summarizes this provision as follows:

> New section 272(g)(1) permits the separate affiliate . . . to jointly market any of its services in conjunction with the telephone exchange services and other services of the BOC so long as the BOC permits other entities offering the same or similar services to sell and market the BOC's telephone exchange services.[28]

Thus, Congress has clearly authorized joint marketing by the BOC and its interLATA affiliate.

Nevertheless, AT&T seeks to restrict this provision in two ways. First, AT&T argues that the language in Section 272(g)(1) requiring that the BOC permit other entities offering the same or similar service to market and sell the BOC's telephone exchange services is a "non-discrimination clause," and that the only way to give effect to this clause is to require that the BOC announce joint marketing arrangements at least three months prior to their implementation.[29]

AT&T's argument that the language in Section 272(g)(1) amounts to a nondiscrimination clause must fail. Congress specifically established nondiscrimination safeguards in Section 272(c) of the 1996 Act. In fact, Section 272(g)(3) specifically cross-references this section and states that the joint marketing provisions in subsection (g) "shall not be construed to violate the nondiscrimination provisions in subsection (c)." Had Congress intended that the provision requiring BOCs to

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[28] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 152 (1996) ("Conference Report" or "Joint Explanatory Statement").

[29] AT&T Comments at 55.

permit "other entities offering the same or similar service to market and sell [the BOC's] telephone exchange services" be considered a nondiscrimination provision, it would have included such a provision in subsection (c). Its failure to do so is controlling here and AT&T's attempt to read into the unambiguous statutory language what is not there should be disregarded.

AT&T argues that an advance notice requirement should be imposed on BOC joint marketing arrangements by analogy to Section 251(c)(5), which requires advance notice of certain network changes.[30] This argument fails, however, because the advance notice requirement is expressly included in Section 251(c)(5), while it is absent from Section 272(g)(1). Specifically, Section 251(c)(5) explicitly requires reasonable advance public notice of any technical changes that will be made in an incumbent LEC's network. By contrast, there is no requirement in Section 272(g)(1) concerning advance public notice of BOC joint marketing arrangements with its interLATA affiliate, and there is no support for such a requirement in the legislative history. Again, Congress could have explicitly imposed such a requirement as it did in Section 251(c); its silence in the highly detailed provisions of Section 272(g)(1) on this matter is controlling.[31]

Second, AT&T has argued that an affiliate cannot jointly market or sell the local exchange services provided by the BOC until it makes "marketing opportunities for its services *equally available* to unaffiliated carriers."[32] Once again, AT&T is attempting to read into the statute what is not there. The statute simply requires a BOC to permit other IXCs to sell and market the BOC's local exchange services.

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30 AT&T Comments at n.45.

31 *See Haas v. IRS*, 48 F.3d 1153, 1156 (11th Cir. 1995) ("Where Congress knows how to say something but chooses not to, its silence is controlling.")

32 AT&T Comments at 56 (emphasis added).

C. AT&T's Attempt to Argue that the Joint Marketing Provisions in Section 272(g)(2) Must Be Construed in Conjunction with Subsections (b) and (e) Is without Merit, and BOCs Should Not Be Precluded from Referring Customers to their Long-Distance Affiliates

Section 272(g)(2) permits a BOC to market or sell the in-region interLATA services provided by an affiliate once the BOC has met the requirements of Section 271(d). According to the Conference Report:

> New section 272(g)(2) permits a BOC, once it has been authorized to provide interLATA service pursuant to new section 271(d), to jointly market its telephone exchange services in conjunction with the interLATA service being offered by the separate affiliate . . . .[33]

As is the case with Section 272(g)(1), subsection (g)(2) is also subject to one rule of construction: under subsection (g)(3), joint marketing does not contravene the nondiscrimination provisions of Section 272(c). No other rules of construction are applicable.

Despite this clear statutory language, however, AT&T attempts to argue that the BOCs' permissible joint marketing must be limited by the requirements of Section 272(b) and 272(e). AT&T thus states that the "critical" question for the Commission is how and when a BOC can market an affiliate's interexchange services "consistently with the terms and purposes of these *other* provisions of § 272."[34] In essence, AT&T would either bar the BOCs entirely from joint marketing, as impinging on the affiliate's independence under Section 272(b), or require the BOCs to jointly market other IXCs' services indiscriminately, under a contorted reading of Section 272(e). Congress clearly did not intend either of these interpretations. The statute explicitly allows a BOC itself to market or sell the interLATA service of its affiliate and states that such joint marketing shall not be considered to violate the nondiscrimination provisions of Section 271(c). This means that a BOC

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33 Conference Report at 152.

34 AT&T Comments at 56 (emphasis added).

is permitted to market or sell its affiliate's interLATA service without having to market or sell unaffiliated IXCs' service.

Accordingly, BellSouth strongly disputes AT&T's claim that if a BOC's employees were to promote the services of its affiliate it would violate the structural separation requirements contained in Section 272(b)(1) and (3).[35] AT&T, like the Commission in Paragraph 92 of the *NPRM*, apparently believes that the separate affiliate would need to purchase marketing services from the BOC on an arm's length basis, or that each should contract with the same outside entity, because of the independent operations requirement and shared employee prohibition in Section 272(b)(1) and (3). However, as BellSouth showed in its comments, the BOC employees who are engaged in the "marketing or sale" of the affiliate's interLATA service will not be employed by the separate affiliate, which is all that Section 272(b)(3) requires, and the BOC's joint marketing efforts will not affect the independent operations of the affiliate. Thus, Section 272(b) poses no obstacle to the BOC using its own employees for the joint marketing of its own local exchange service and its affiliate's interLATA service.[36] To the extent the BOC performs marketing services for the affiliate, the provision of such services is not required to be available to others on a nondiscriminatory basis, by virtue of Section 272(g)(3).

In addition, AT&T argues for severe restrictions on inbound marketing. AT&T argues that when a BOC is receiving an order for local service, it should be barred from turning such communications into opportunities for its long-distance affiliate, and that to the extent a BOC refers customers to its long-distance affiliate it must do so for all other carriers on reasonable and non-

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35 *See* AT&T Comments at 57.

36 Moreover, whether the BOC resells the affiliate's service on its own account or acts as an agent or dealer for the affiliate, the transactions between the BOC and its affiliate must be reduced to writing, pursuant to § 272(b)(5), as the Commission notes in Paragraph 92 of the *NPRM*.

discriminatory terms and conditions.[37] AT&T also argues that all a BOC should be able to do in terms of inbound marketing is list its affiliate's service on the equal access ballot, together with AT&T and other companies.[38] These positions are not supported by Section 272(g)(2) or its legislative history, which specifically *permit* a BOC to sell or market the interLATA services of its affiliate, without limitation, as soon as the BOC is authorized to provide interLATA service. Thus, a BOC clearly is authorized to market its affiliate's service (and *only* its affiliate's service, should it so choose) by promoting it to callers and selling it to them.[39] One must read Section 272(g)(2) right out of the statute to claim that the BOC cannot, as part of its authorized marketing efforts, promote the affiliate's service to callers.

Moreover, the Commission has recently rejected similar concerns in the open video systems docket. There, a commenter had argued that because "incumbent LECs stand in a unique position with regard to any other supplier of telecommunications or information services, since they are frequently the first company contacted by new residents in an area in order to start up essential telephone service," joint marketing should be restricted and incumbent LECs should be required "to advise consumers that other video offerings are available in their area."[40] The Commission, however, declined to adopt the proposed restriction on joint marketing, noting Congress' silence on the issue.[41] Further, the Commission stated that the burden lies with the party proposing such

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37 AT&T Comments at 58.

38 *Id.*

39 It is important to note that by allowing the BOCs to "market or sell" their affiliate's interLATA service, Congress did not limit the BOCs to simply referring customers to the affiliate. It allowed the BOCs to sell the interLATA service directly.

40 *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, CS Docket No. 96-46, *Third Report and Order and Second Report and Order on Reconsideration*, FCC 96-334, at ¶ 213 (released Aug. 8, 1996).

41 *Id.* at ¶ 214.

restrictions to justify their necessity by showing, at a minimum, "that consumers otherwise would likely be unaware of the existence of other video service options."[42] In the case of Section 272(g)(2), Congress is indeed silent as to the joint marketing restrictions proposed by AT&T. AT&T also has not met the burden of showing such restrictions are necessary, since customers are clearly aware of the other long-distance service providers, particularly the big three, AT&T, MCI, and Sprint, as the MTA-EMCI Study demonstrates.[43] For these reasons, AT&T's joint marketing restrictions should be rejected.

When Congress authorized the BOCs to engage in joint marketing, it sought to promote parity among the BOCs and their soon-to-be competitors, the big three IXCs. All of these companies may engage in joint marketing *in order to compete with each other* and *to give consumers choices.* Imposing regulatory handcuffs on one competitor's ability to market local and long-distance service jointly, while leaving the others unconstrained, is the last thing Congress intended. AT&T seeks to hamstring its competition, plain and simple, and deny consumers the ability to choose the BOC as their single point of contact for local and long-distance service. To do so would violate the letter and the spirit of Congress's landmark pro-competitive, pro-consumer statute.

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[42] *Id.*

[43] *See* MTA-EMCI Study at 118, 155.

III. RESTRICTIONS ON THE BOC INTERLATA AFFILIATE BEYOND THOSE ENUMERATED IN THE STATUTE ARE IMPERMISSIBLE (*NPRM* ¶¶ 57-60)

BellSouth demonstrated in its Comments that no non-accounting safeguards should be adopted beyond what Congress has already put in place in the statute. Nevertheless, several commenters have urged the Commission to impose restrictions on the BOCs' interLATA affiliates that go well beyond those listed in Section 272. All of these restrictions should be rejected. Congress expressly listed the restrictions that apply to a Section 272 affiliate. It knew how to impose other restrictions, as it did in other sections of the statute, but it chose not to do so here. BellSouth agrees with Bell Atlantic's observation that "[t]he detailed provisions of the Act itself 'spell out the structural and transactional requirements that apply to the separate subsidiary,' and the requirements in section 272 are themselves 'quite precise.'"[44] Moreover, the Commission itself has acknowledged that "'[w]here Congress knows how to say something but chooses not to, its silence is controlling.'"[45] Congress specified what the rules were for the Section 272 separate affiliate, and its decision not to include other rules is the end of the matter.

For example, numerous commenters asked the Commission to impose restrictions based on the *Computer II* rules on the BOC affiliate by bootstrapping them onto the "operate independently" requirement in Section 272(b)(1).[46] This cannot be done without violence to the statute. At the

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44 Bell Atlantic Comments at 2 (footnotes omitted) (citing Joint Explanatory Statement at 150; *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket 96-152, *Notice of Proposed Rulemaking*, FCC 96-310, at ¶ 43 (July 18, 1996)).

45 *Open Video Systems, Second Report and Order*, 3 Com. Reg. (P & F) at 275 n.564 (*quoting Haas v. IRS*, 48 F.3d at 1156)).

46 *See, e.g.*, Comments of Association for Local Telecommunications Services at 4; AT&T at 19-24; Excel Telecommunications, Inc. at 4-8; Independent Data Communications Manufacturers Association at 4-6; Information Technology Association of America at 18-19; MCI at 23-27; Sprint at 26; Telecommunications Resellers Association at 13; Time Warner Cable at 18. *But See* Comments of Ameritech at 37-38; Bell Atlantic at 30; Pacific Telesis Group at 20;

conclusion of a legislative process in which every possible alternative was studied, Congress carefully determined which language from the *Computer II* rules to include in Section 272(b). The silence of Congress with respect to structural restrictions that were not included "is controlling."[47]

One particularly egregious example of a restriction that Congress did *not* impose is Time Warner Cable's suggestion, based on the *Computer II* rules, that the BOC affiliate should be forbidden "to construct, own or operate its own transmission facilities" and instead obtain those facilities from other carriers.[48] Time Warner admits that this is "not explicit in the statute," but suggests that such a restriction would "faithfully implement[] the requirement for independent operation."[49] In fact, Time Warner's suggestion that requiring the affiliate to be completely *dependent* would ensure its *independence* demonstrates that it is seeking to undermine the carefully balanced scheme established by Congress. Congress stated explicitly what restrictions were to be imposed on the affiliate, and engaging in facilities-based interLATA competition is not restricted. The Commission cannot impose such a restriction merely because Time Warner wishes it were in the statute.

For the same reason, the activities restricted under other statutory separate affiliate requirements, such as Section 274(b), that are *not* included in Section 272(b) must be permitted. Congress knew how to forbid such activities and made the conscious choice to forbid them of one separate affiliate and not another. The Commission is not free to redraft the statute.

Comments of Ameritech at 37-38; Bell Atlantic at 30; Pacific Telesis Group at 20; Telecommunications Industry Association at 24-25; United States Telephone Association at 20; Yellow Pages Publishers Association at 5-8.

47 *Haas,* 48 F.3d at 1156 (*quoted in Open Video Systems, Second Report and Order,* 3 Com. Reg. (P & F) at 275 n.564).

48 Time Warner Cable Comments at 17-18.

49 *Id.* at 18, 17.

IV. ENFORCEMENT PROCEDURES (*NPRM* ¶¶ 94-97)

BellSouth objects strongly to the procedures AT&T has proposed for enforcement proceedings in response to complaints filed under Section 271(d)(6)(B). Specifically, AT&T outlines a series of procedural deadlines that would lead to a final Commission adjudication of liability and equitable relief in response to complaints within 90 days. As part of this process, AT&T would require the defendant BOC to file its answer to the complaint, responses to discovery requests, and its own discovery requests, *within fourteen days* after filing of the complaint, even though the complainant had no limit on the time to prepare its complaint and discovery requests.[50]

First, the 90-day limit does not pertain to final Commission adjudications under Section 271(d)(6)(A). AT&T appears to confuse Section 271(d)(6)(A), which authorizes the Commission to conduct enforcement proceedings, with Section 271(d)(6)(B), which authorizes the Commission to entertain complaints. AT&T recognizes that the 90-day deadline for action applies only to action on complaints,[51] but it nevertheless would apply that deadline to enforcement proceedings held under the other subsection.

That is unnecessary and inappropriate. Section 271(d)(6)(A) sets no time limit for the Commission's conduct of an enforcement proceeding. Such proceedings, under the statute, are begun only *after* the Commission determines that a BOC has failed to continue complying with the conditions required for interLATA entry. Such a determination is made, in the case of a complaint brought under Section 271(d)(6)(B), when the Commission acts on the complaint, which must be done within 90 days. In short, Congress imposed a time limit only on processing and acting on complaints. That action occurs when the Commission (or its staff, acting on delegated authority) decides whether to dismiss the complaint or initiate an enforcement proceeding. If the Commission

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50 AT&T Comments at 52.

51 AT&T Comments at 50.

finds, on the basis of the evidence before it, that the complainant has made out a *prima facie* case, it will then initiate a Section 271(d)(6)(A) enforcement proceeding, in which the BOC is to be given notice and an opportunity for hearing. There is no statutory time limit on the enforcement proceeding itself.

If Congress had intended that Section 271(d)(6)(A) enforcement proceedings should be subject to a 90-day time limit, *including* the time needed to process the complaint, surely Congress would have mentioned in Section 271(d)(6)(A) that enforcement proceedings were subject to such a time limit. It did not. If Congress had intended the Commission to impose a time limit on enforcement proceedings initiated in response to complaints but not on enforcement proceedings initiated on the Commission's own motion, it would have so stated (and presumably would have provided an explanation). The fact that the statute and the legislative history are silent on this issue makes it clear that this is not what Congress intended.

An enforcement proceeding in which the Commission must decide whether to revoke a BOC's authority to continue engaging in previously-authorized interLATA telecommunications service will necessarily be a complex proceeding involving the production and review of massive quantities of documents. It is questionable whether all of the documents involved in such a proceeding could be identified, produced, and analyzed within 90 days, even without the Commission taking final action.

AT&T's proposed schedule of events is utterly unworkable. It is folly to suggest that a BOC be given just 14 days, after a complaint is filed that places in issue its entire interLATA business, to supply "all relevant documentation," respond to all of the complainant's discovery requests, and propound its own discovery requests. Such a filing is likely to involve thousands or even millions